85
120 &
(11)
69pp
No. 06-1204
FILED
JAN 17 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

REPUBLIC OF THE PHILIPPINES, PHILIPPINE PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT, PHILIPPINE NATIONAL BANK, AND ARELMA, INC.,
Petitioners,

v.

MARIANO J. PIMENTEL, THE ESTATE OF ROGER ROXAS, AND GOLDEN BUDHA CORP.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

STEPHEN V. BOMSE
Counsel of Record
JOSHUA E. ROSENKRANZ
RACHEL M. JONES
ADAM J. GROMFIN
Heller Ehrman LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

Counsel for Petitioners Republic of the Philippines and PCGG

KENNETH S. GELLER
CHARLES A. ROTHFELD
DAVID M. GOSSETT
ELIZABETH G. OYER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners Philippine National Bank and Arelma, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

This interpleader action was brought to settle ownership of assets of Arelma, Inc., a shell corporation established by Ferdinand Marcos when he was President of the Republic of the Philippines. The assets are claimed by the Republic, which maintains that they belong to it under Philippine law because they were acquired through the misuse of public office; by the Philippine National Bank, which now controls Arelma and has agreed to cede ownership in accordance with the decision of a Philippine court; and by a class of private judgment creditors of the Marcos estate. The Republic and its Presidential Commission on Good Government (PCGG) were dismissed from the action on sovereign immunity grounds. In their absence, however, the district court held them not to be "indispensable" parties under Fed. R. Civ. P. 19(b), proceeded to resolve the interpleader action, and awarded the disputed assets to the class of private claimants. The Ninth Circuit affirmed. The case presents the following questions:

Whether the Republic and its PCGG, having been dismissed from the interpleader action based on their successful assertion of sovereign immunity, had the right to appeal the district court's determination that they are not "indispensable" parties under Fed. R. Civ. P. 19(b); and whether they have the right to seek this Court's review of the court of appeals' opinion affirming the district court.

Whether a foreign government that is a "necessary" party to a lawsuit under Rule 19(a) and has successfully asserted sovereign immunity is, under Rule 19(b), an "indispensable" party to an action brought in the courts of the United States to settle ownership of assets claimed by that government.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state that the Philippine National Bank (PNB) is a publicly traded corporation, in which the Republic of the Philippines has a minority ownership interest. PNB has no parent corporation and no publicly held company owns 10% or more of its stock. Arelma, S.A., which has been incorrectly referred to as Arelma, Inc. throughout this litigation, is a Panamanian corporation whose shares are held in escrow by PNB. The Republic of the Philippines and the Philippine Presidential Commission on Good Government, as governmental entities, are exempt from Rule 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
RULE 29.6 STATEMENT ii
TABLE OF AUTHORITIES vi
OPINIONS BELOW 1
JURISDICTION 1
RULE PROVISIONS INVOLVED 1
STATEMENT 1
SUMMARY OF ARGUMENT 14
ARGUMENT 16
I. The Rule 19 Question Was Properly Brought Before The Court Of Appeals And This Court. 16
A. PNB and Arelma properly brought the Rule 19 question before the court of appeals and this Court. 17
B. The Republic was entitled to appeal and seek review in this Court. 19
II. In The Republic's Absence, This Case Should Be Dismissed Under Rule 19(b) 25
A. A case must be dismissed under Rule 19(b) when a necessary party is unavailable because it has sovereign immunity 27
1. Allowing suit to proceed when a necessary party asserts sovereign immunity is inconsistent with the policies of the immunity doctrine. 27

TABLE OF CONTENTS—continued

Page

2. This and other courts have recognized that an action should not proceed when a necessary party whose interests will be affected by the litigation is immune from suit.....31
3. The conclusion that the immune party's claim to the disputed assets would not prevail on the merits if litigated is not a proper basis for disregarding its sovereign immunity. 34

B. Even apart from the Republic's immunity, this suit should be dismissed under Rule 19(b). 36

1. Further litigation is improper because it will impair the interests of absent parties. 37
2. The judgment could not be structured to protect the interests of absent parties. 42
3. The judgment here is not "adequate" because it does not result in the complete and efficient settlement of the controversy. 43
4. Dismissal is proper even if there is no alternative forum in which the Pimentel class may assert its current claims.....45

TABLE OF CONTENTS—continued

Page

5. The imperative that a dispute over ownership of assets stolen by a former President of the Republic be settled in a Philippine court, and the adverse impact of this litigation on international anti-corruption efforts, are additional "compelling substantive interests" that require dismissal of this suit. 47

CONCLUSION 52

ADDENDUM: Fed. R. Civ. P. 19 (effective December 1, 2007).....1a

TABLE OF AUTHORITIES

Page(s)

U.S. CASES

Am. Greyhound Racing, Inc. v. *Hull*,
305 F.3d 1015 (9th Cir. 2002) 46

Am. Guaranty Corp. v. *Burton*,
380 F.2d 789 (1st Cir. 1967) 30

Am. Ins. Ass'n v. *Garamendi*,
539 U.S. 396 (2003) 45

Bhd. of R.R. Trainmen v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519 (1947) 24

California v. *Arizona*,
440 U.S. 59 (1979) 31

Cobbledick v. *United States*,
309 U.S. 323 (1940) 24

Cohen v. *Beneficial Indus. Loan Corp.*,
337 U.S. 541 (1949) 23

Davandewa v. *Salt River Project Agric. Improvement & Power Dist.*,
276 F.3d 1150 (9th Cir. 2002) 46

Davis v. *United States*,
343 F.3d 1282 (10th Cir. 2003) ..... *passim*

Devlin v. *Scardelletti*,
536 U.S. 1 (2002) 19, 20, 22

DiBella v. *United States*,
369 U.S. 121 (1962) 24

Dole Food Co. v. *Patrickson*,
538 U.S. 468 (2003) 28

Enter. Mgmt. Consultants, Inc. v. *United States*, 883 F.2d 890 (10th Cir. 1989) 29, 32

Fed. Maritime Comm'n v. *S.C. State Ports Auth.*, 535 U.S. 743 (2002) 28, 29, 30, 35

TABLE OF AUTHORITIES—continued

Page(s)

Fluent v. *Salamanca Indian Lease Auth.*,
928 F.2d 542 (2d Cir. 1991) 32, 33

Gonzalez v. *Cruz*,
926 F.2d 1 (1st Cir. 1991) 44

Haas v. *Jefferson Nat'l Bank of Miami Beach*,
442 F.2d 394 (5th Cir. 1971) 44

Hilao v. *Estate of Marcos*,
103 F.3d 767 (9th Cir. 1996) 6, 47

Hoe v. *Wilson*,
76 U.S. 501 (1869) 18

Hoheb v. *Muriel*,
753 F.2d 24 (3d Cir. 1985) 44

Ill. Brick Co. v. *Illinois*,
431 U.S. 720 (1977) 45

In re Briscoe,
448 F.3d 201 (3d Cir. 2006) 38

Karcher v. *May*,
484 U.S. 72 (1987) 19

Keweenaw Bay Indian Cmty. v. *Michigan*,
11 F.3d 1341 (6th Cir. 1993) 38

Mallow v. *Hinde*,
25 U.S. (12 Wheat.) 193 (1827) 18

Mathews v. *Eldridge*,
424 U.S. 319 (1976) 23

Mine Safety Appliances Co. v. *Forrestal*,
326 U.S. 371 (1945) 31

Minnesota v. *N. Secs. Co.*,
184 U.S. 199 (1902) 18

TABLE OF AUTHORITIES—continued

Page(s)

Minnesota v. *United States*,
305 U.S. 382 (1939) 23, 31

Nat'l City Bank of N.Y. v. *Republic of China*, 348 U.S. 356 (1955) 28, 29, 33, 34

Provident Tradesmens Bank & Trust Co. v. *Patterson*, 390 U.S. 102 (1968) ..... *passim*

Republic of Austria v. *Altmann*,
541 U.S. 677 (2004) 28

Republic of Mexico v. *Hoffman*,
324 U.S. 30 (1945) 48

Roos v. *Tex. Co.*,
23 F.2d 171 (2d Cir. 1927) 37

Schooner Exch. v. *McFaddon*,
11 U.S. (7 Cranch) 116 (1812) 28

Segni v. *Commercial Office of Spain*,
816 F.2d 344 (7th Cir. 1987) 28

Seneca Nation of Indians v. *New York*,
383 F.3d 45 (2d Cir. 2004) 32, 46

Shermoen v. *United States*,
982 F.2d 1312 (9th Cir. 1992) 38

Smallwood v. *Ill. Cent. R.R. Co.*,
352 F.3d 220 (5th Cir. 2003) 38

State Farm Fire & Cas. Co. v. *Tashire*,
386 U.S. 523 (1967) 41, 42

Tankersley v. *Albright*,
514 F.2d 956 (7th Cir. 1975) 38

U.S. Catholic Conference v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988) 24

TABLE OF AUTHORITIES—continued

Page(s)

United States ex rel. Hall v. *Tribal Dev. Corp.*, 100 F.3d 476 (7th Cir. 1996)..... 33, 42, 46

United States ex rel. Louisiana v. *Jack*, 244 U.S. 397 (1917)..... 20, 21

United States v. *Nixon*, 418 U.S. 683 (1974)..... 24

United States v. *U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940)..... 33

Verlinden B.V. v. *Cent. Bank of Nigeria*, 461 U.S. 480 (1983)..... 28, 46, 48

Wichita & Affiliated Tribes of Okla. v. *Hodel*, 788 F.2d 765 (D.C. Cir. 1986) .....*passim*

Wilbur v. *Locke*, 423 F.3d 1101 (9th Cir. 2005)..... 46

FOREIGN CASES

Fed. Police Dept. v. *Aguamina Corp.*, No. 1A.87/1997 (Swiss Fed. Sup. Ct. Dec. 10, 1997)..... 4, 51

Fed. Office for Police Affairs v. *Fondation Maler, Arelma, Inc., et al.*, No. B 65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997).... 4, 25, 51, 52

In re Aguamina Corp., No. 1A.31, 41/1998 (Swiss Fed. Sup. Ct. Mar. 12, 1998)..... 4, 51

Republic of the Philippines v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997 (Swiss Fed. Sup. Ct. Jan. 7, 1998)..... 4, 51, 52

TABLE OF AUTHORITIES—continued

Page(s)

Republic of the Philippines v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003) 5, 25

STATUTES AND RULES

18 U.S.C. § 1963(c) 3
28 U.S.C. § 1254 19
28 U.S.C. § 1254(1) 1, 24
28 U.S.C. § 1291 23
Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604 7
28 U.S.C. § 2467(c)(1) 41
Fed. R. Civ. P. 12(b)(7) 18
Fed. R. Civ. P. 19 ..... *passim*
Fed. R. Civ. P. 19(a) ..... *passim*
Fed. R. Civ. P. 19(a)(2) 7
Fed. R. Civ. P. 19(a)(2)(i) 25
Fed. R. Civ. P. 19(b) ..... *passim*

TREATIES

Treaty on Mutual Legal Assistance on Criminal Matters, Nov. 13, 1994, U.S.-Phil., Art. 16, S. Treaty Doc. No. 18, 104th Cong., 1st Sess. (1996) 41, 50
United Nations Convention Against Corruption, G.A. Res. 4 (LVII), U.N. Doc. A/RES/58/4 (2003) 41, 50

TABLE OF AUTHORITIES—continued

Page(s)

United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/59/508 (2004) 30

MISCELLANEOUS

Advisory Committee Notes, 1966 Amendment to Rule 19 ..... 19, 42, 47

Brief of the United States as Amicus Curiae in Support of Defendant-Appellant, *Belize Telecom, Ltd.* v. *Gov't of Belize*, No. 05-12641-CC (11th Cir. Oct. 6, 2005), http://www.state.gov/s/l/2005/87217.htm..... 31

C. Chao & C. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147 (2001) 40

Comprehensive Agrarian Reform Law of 1988, Philippine Republic Act No. 6657 (1988) 49

The Federalist, No. 81 (C. Rossiter ed. 1961) (Hamilton) 28

H.R. REP. NO. 94-1487 (1976) 48

B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, pt. 1, 81 HARV. L. REV. 356 (1967) 47

4 J. Moore *et al.*, *Moore's Federal Practice* (2006):

§ 19.05[2][c] 32

§ 19.05[2][d] 37

TABLE OF AUTHORITIES—continued

Page(s)

Phil. Exec. Order No. 1 (Feb. 28, 1986) (Pres. Corazon Aquino) 49

Phil. Exec. Order No. 14 (May 7, 1986) (Pres. Corazon Aquino) 49

Rep. Act No. 1379, 51:9 O.G. 4457 (Phil. June 18, 1955) 3

Restatement (Third) of Foreign Relations Law § 482 (1987) 40

Statement of the U.S. Delegation, Fifth Global Forum on Fighting Corruption & Safeguarding Integrity, Sandton Convention Centre, Johannesburg, South Africa, April 3, 2007, available at http://www.state.gov/p/inl/rls/other/82588.htm. 51

7 C. Wright *et al.*, *Federal Practice and Procedure* (3d ed. 2001):

§ 1607 47

§ 1608 44

§ 1609 ..... 17, 18

§ 1617 31

§ 1705 22

15A C. Wright *et al.*, *Federal Practice and Procedure* § 3902.1 (3d ed. 2001) 20

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a–11a, 12a–20a, and 21a–29a) are reported at 464 F.3d 885, 448 F.3d 1072, and 446 F.3d 1019. The final order of the court of appeals denying petitioners' rehearing petition (Pet. App. 61a–62a) is reported at 467 F.3d 1205. The orders of the district court regarding indispensability (Pet. App. 55a–60a) and granting final judgment (Pet. App. 43a–54a) are unreported.

JURISDICTION

After twice revising its opinion, the court of appeals entered its judgment on September 12, 2006, and denied a timely petition for rehearing on November 3, 2006. On January 24, 2007, Justice Kennedy extended the time for filing a petition for a writ of certiorari to March 5, 2007. The petition was filed on that date and granted on December 3, 2007. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RULE PROVISIONS INVOLVED

Relevant portions of Rule 19 of the Federal Rules of Civil Procedure, as it existed before December 1, 2007, are reproduced at Pet. App. 63a–64a. Relevant portions of the 2007 revision to Rule 19 are reproduced in an addendum to this brief.

STATEMENT

This case is an interpleader action brought to determine ownership of assets stolen by Ferdinand E. Marcos while he was President of the Republic of the Philippines and secreted in Arelma, S.A., a Panama-

nian shell corporation he created for this purpose. The Republic claims the assets, to which it is entitled under Philippine law. The assets also are claimed by, among others, a class of plaintiffs who were injured by Marcos during his presidency and who obtained a judgment against the Marcos estate in an earlier, unrelated suit. The Republic successfully asserted its sovereign immunity and was dismissed from the interpleader action. In the Republic's absence, however, the district court held that the Republic is not an indispensable party under Fed. R. Civ. P. 19(b),[1] adjudicated the interpleader suit, and awarded the assets in their entirety to the class of Marcos creditors. The Ninth Circuit affirmed, holding that the Republic's sovereign immunity did not bar the suit from proceeding or prevent disposition of the assets claimed by the Republic.

This holding departs from Rule 19 in several fundamental respects. That Rule permits courts to take account of compelling substantive interests such as sovereign immunity. In addition, and wholly apart from the Republic's immunity, the approach taken below guarantees an inequitable result either by denying a hearing to a party with a substantial claim to disputed assets or by subjecting an interpleader stakeholder to duplicative litigation and liability. This outcome is especially troubling because the Ninth Circuit's disposition directly interferes with

---

[1] While the petition for a writ of certiorari was pending, a revised version of Rule 19 went into effect. The revisions were described by the Advisory Committee as "stylistic only." Because the decisions of the lower courts in this case made use of the old terminology, as does the question posed for the parties by the Court, this brief generally does so as well, although it notes the changes where relevant.

the vital national interests of an important ally of the United States and threatens to undermine broader international efforts to combat official corruption. The decision below accordingly should not stand.

1. In 1986, a popular uprising—the "people power" revolution—overthrew Ferdinand Marcos as President of the Philippines. Under Philippine law, assets derived from misuse of public office are forfeit to the Republic from the moment they are appropriated (see Rep. Act No. 1379, 51:9 O.G. 4457 (June 18, 1955)).[2] The Republic accordingly set out to recover the vast sums stolen by Marcos during his 20-year tenure as President. As her first act in office, the Republic's new President, Corazon Aquino, created the Philippine Presidential Commission on Good Government (PCGG), which was given responsibility for locating and recapturing assets that had been wrongfully acquired by Marcos. Reclaiming such assets is one of the Philippine government's most urgent priorities: the Republic has informed the United States Department of State that the "recovery of [Marcos's] ill-gotten wealth" is "a preeminent responsibility of the Philippine government" that "represents a national interest of the Republic that is of the highest order." Pet. App. 65a.

The PCGG's mission took it to Switzerland, where Marcos had secreted much of his misappropriated property. At the PCGG's request, the Swiss gov-

---

[2] U.S. forfeiture law is similar. See, *e.g.*, 18 U.S.C. § 1963(c) (under Racketeer Influenced and Corrupt Organizations Act, "[a]ll right, title, and interest in [forfeited] property * * * vests in the United States upon commission of the act giving rise to forfeiture under this section").

ernment froze Marcos-related assets pending the outcome of civil and criminal proceedings against Marcos and his estate in the Philippines. Republic's Court of Appeals Excerpts of Record (CA9 E.R.) 288, 313, 348–349. Ultimately, because the Swiss Federal Supreme Court found no reasonable doubt that Marcos had obtained his Swiss assets illegally, the court held in 1997 and 1998 that the assets should be transferred to an escrow account at the Philippine National Bank (PNB). See JA 69, 86 (reproducing *Fed. Office for Police Affairs* v. *Fondation Maler, Arelma, Inc., et al.*, No. B 65471/29 (Swiss Fed. Sup. Ct. Dec. 19, 1997)).[3] The Swiss court conditioned these transfers on the Republic's guaranteeing that the eventual allocation of the assets would be made in accordance with the outcome of Philippine judicial proceedings between the Philippine government and the Marcos estate. See *id.* at 80. The PCGG and PNB accordingly entered into escrow agreements obligating PNB to dispose of the repatriated property as directed by a final judgment of the appropriate Philippine court determining the assets' rightful owner. CA9 E.R. 150–155.

In the Philippines, the PCGG in 1991 brought a forfeiture action regarding the Swiss assets before the Sandiganbayan, an anti-corruption court with exclusive jurisdiction to resolve issues relating to property allegedly pilfered by Marcos. CA9 E.R. 106, 174–251. Marcos's widow, Imelda Marcos, and the Marcos estate have been fully represented in these

---

[3] See also *In re Aguamina Corp.*, No. 1A.31, 41/1998 (Swiss Fed. Sup. Ct. Mar. 12, 1998); *Republic of the Philippines* v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997 (Swiss Fed. Sup. Ct. Jan. 7, 1998); *Fed. Police Dept.* v. *Aguamina Corp.*, No. 1A.87/1997 (Swiss Fed. Sup. Ct. Dec. 10, 1997).

proceedings. In 2000, the Sandiganbayan ruled that the Swiss assets belong to the Republic. The Sandiganbayan subsequently set aside its judgment on technical grounds, but the Philippine Supreme Court reversed, ruling in the PCGG's favor. *Republic of the Philippines* v. *Honorable Sandiganbayan*, G.R. No. 152154 (Phil. July 15, 2003).

2. This case involves a dispute about ownership of a subset of the Marcos assets sent by Swiss authorities to be held in escrow by PNB. In 1972, Marcos created and transferred $2 million to Arelma, S.A., a Panamanian corporation with two outstanding shares that, prior to 1998, were held in Switzerland. Arelma invested the funds with Merrill Lynch, Pierce, Fenner & Smith, Inc., in New York, and by 2000 that investment had grown to approximately $35 million. Following the initial freeze of Marcos-related property in 1986, Swiss authorities identified Arelma as a repository for Marcos's assets; Swiss police officials subsequently included Arelma's share certificates among the assets transferred to PNB to be held in escrow pending final determination of ownership by the Philippine courts. Pet. App. 7a, 49a–50a. Pursuant to this transfer, the share certificates are now in the Philippines.[4]

The forfeiture action brought by the PCGG in the Sandiganbayan specifically listed Arelma and the Merrill Lynch account as the proceeds of illegal activity that have at all times belonged to the Philippine government. CA9 E.R. 106, 174–251. Although the

---

[4] That transfer made PNB the sole shareholder of Arelma, with exclusive authority under Panamanian law to elect officers and directors and to determine the disposition of the corporation's assets.

Philippine Supreme Court's decision in the forfeiture proceeding unequivocally favored the Republic's legal claim regarding Marcos's Swiss property, it did not expressly mention Arelma. The PCGG therefore has filed a motion before the Sandiganbayan seeking a clarification that the Arelma assets indeed were forfeit to the Republic. That litigation, which will conclusively determine ownership of the Arelma assets as a matter of Philippine law, is now pending before the Sandiganbayan and will be resolved by that court or the Philippine Supreme Court.

3. In July 2000, while the Marcos-related litigation was pending in the Philippine courts, the PCGG asked Merrill Lynch to surrender the Arelma assets to PNB, to be held in escrow pending final determination of ownership. Merrill Lynch declined to do so, "apparently because of the existence of other claimants" (Pet. App. 31a)—most notably, a class of thousands of victims of the Marcos regime (the Pimentel class) who had obtained a near-$2 billion judgment against the Marcos estate in the U.S. District Court for the District of Hawaii. See *Hilao* v. *Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). Evidently at the direction of Judge Real, the district judge who had presided over the Pimentel class action, Merrill Lynch ultimately initiated this interpleader suit in the District of Hawaii to resolve competing claims to the Arelma assets.[5] The named defendants in the action

---

[5] Merrill Lynch initially stated that it would await the outcome of the Sandiganbayan proceedings before surrendering the Arelma assets. CA9 E.R. 393–395. When the Pimentel class asserted ownership of the assets, however, Judge Real directed Merrill Lynch to appear before him and instructed the firm to commence an interpleader proceeding not in New York, where

came to include the Republic; the PCGG; PNB; Arelma; Marcos heirs and others who assert a right to act for Arelma; and judgment creditors of the Marcos estate, among them the Pimentel class. See Pet. App. 31a.[6]

The Republic, the PCGG, PNB, and Arelma sought dismissal of the interpleader action. As a foreign sovereign and its instrumentality, the Republic and the PCGG (referred to collectively as "the Republic") asserted sovereign immunity under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604. Invoking Federal Rule of Civil Procedure 19, each of the interpleader defendants maintained that the unavailability of the Republic required dismissal of the action. The Republic was a "necessary" party to the suit within the meaning of Rule 19(a)(2), they argued, because adjudication of the interpleader action would impair its ability to protect its claim to the Arelma assets. The Republic was an "indispensable" party within the meaning of Rule 19(b), the argument continued, because resolution of the interpleader action effectively would render meaningless its assertion of immunity by resolving ownership of assets in which it claimed an interest. See Pet. App. 31a–32a.

Merrill Lynch is headquartered and where the funds were held, but in Hawaii. *Id.* at 31–32.

[6] The Marcos creditors also include the estate of Roger Roxas and the Golden Budha [*sic*] Corporation, which had obtained a substantial judgment against Imelda Marcos in Hawaii state court. See Pet. App. 3a. The Roxas estate and Golden Budha Corporation also filed a petition for a writ of certiorari challenging the Ninth Circuit's decision in this case (No. 06-1039), which remains pending.

Instead of addressing the Republic's claim of sovereign immunity, however, the district court effectively ruled against the Republic *on the merits*, holding that it was not a "real part[y] in interest" in the interpleader action. See Pet. App. 32a. Judge Real thus dismissed the Republic from the suit on the ground that it was neither necessary nor indispensable under Rule 19 because it had no enforceable claim to the Arelma assets. The district court enjoined the Republic from bringing further actions in the United States to pursue the assets. See *id.* at 32a–33a.

The Republic appealed and the Ninth Circuit reversed. Pet. App. 30a–42a. The court held that since the Republic asserted immunity from suit under the FSIA, the district court should have granted its motion to dismiss on that ground. *Id.* at 39a. Given that immunity, the district court had no authority to inquire into the merits of the Republic's claim. Turning to Rule 19 and disposition of the interpleader action, the court held that the Republic is a "necessary" party under Rule 19(a) because it has a claim to the assets at issue in the litigation—a claim the court labeled "substantial." *Id.* at 41a. In addition, the Ninth Circuit noted that, "[g]iven the inability of the court to resolve the claims of the Republic and the PCGG, it is difficult to see how the interpleader action can proceed in their absence" under Rule 19(b). *Ibid.*[7]

---

[7] PNB and Arelma supported the Republic's Rule 19 arguments, noting that they could not represent the interests of the Republic—in Arelma's case because it "would have rights in those assets if, but only if, they are *not* owned by the Republic," Arelma/PNB Br., at 3, available at 2002 WL 32102117 (emphasis in original), and in PNB's case because, as an escrow agent, it "would have a [*sic*] irreconcilable conflict were it to act on be-

Rather than dismiss the action outright, however, the court, with the Republic's consent, ordered that the suit be stayed pending resolution of litigation in the Philippines regarding ownership of the Arelma assets. *Id.* at 42a.

4. On remand, the district court promptly dissolved the stay. Judge Real ruled that the Republic, now absent from the litigation because it had been dismissed on sovereign immunity grounds, was not an indispensable party within the meaning of Rule 19(b). Pet. App. 55a–60a. The court so held by, again, addressing the merits of the Republic's position, ruling this time that the Republic has "no legally protectible interest in the assets at issue in this proceeding" because any claim it brought for the Arelma funds held by Merrill Lynch in the United States would be time-barred. *Id.* at 57a. The court did not separately address the arguments raised by PNB and Arelma as to why litigation could not proceed in the absence of the Republic. CA9 E.R. 268–285; JA 4. Without the participation of the Republic, the court proceeded to adjudicate entitlement to the Arelma assets, awarding them in their entirety to the Pimentel class. *Id.* at 43a–54a.

5. On appeal, the Republic challenged the district court's Rule 19 decision, as did PNB and Arelma.[8] The Ninth Circuit affirmed. Pet. App. 1a–11a, 12a–20a, 21a–29a. In its initial opinion (*id.* at 21a–29a), the court began by opining that the indis-

---

half of one of the parties to the escrow, particularly where, as here, PNB is required to transfer the assets to whomever is found to be entitled to them by the Philippine courts." *Id.* at 11 (citations omitted).

[8] See Arelma/PNB Br. at 42–44, available at 2004 WL 3493816.

pensability test of Rule 19(b) is shaped by considerations of "fairness and the moral weighing that should attend the judge's choice of solutions." *Id.* at 25a. Applying this standard, the Ninth Circuit noted that many years had gone by since the Arelma assets were placed in escrow and "the Republic has not obtained a judgment that the assets in dispute belong to it." Although the court did "not hold the Republic guilty of laches"—it hardly could have, as the PCGG has been diligently pursuing Marcos's assets around the world and in the Philippine courts for the last twenty years—the court regarded the Republic's "failure to secure a judgment affecting these assets" as an equitable "factor to be taken into account." Pet. App. 26a.

The court also "note[d] the presence in this action of victims of the former president of the Republic," asking: "In good conscience, can we deny some small measure of relief to the class whose members have been found to have been grievously injured and who have the final judgment of a court assessing their wrongs and fixing their remedy?" *Id.* at 27a. The court thought not. As a "final consideration," the court echoed Judge Real's view that resolution of the interpleader suit would not harm the Republic because the New York statute of limitations would bar any effort to obtain the Arelma assets from Merrill Lynch, so that, "[r]ealistically, we cannot envisage a lawsuit in which the Republic will prevail." *Id.* at 28a. These considerations led the court to conclude

that the Republic is not an indispensable party to the interpleader action.[9]

6. The Republic sought rehearing, arguing that "moral weighing" is not the standard established by Rule 19(b). In response, the panel withdrew its opinion and substituted a new one. Pet. App. 1a–11a. The revised decision removed the reference to "moral weighing" and was restructured to address directly the criteria identified in Rule 19(b); however, it substantially incorporated the reasoning of the initial decision. It thus reaffirmed the holding that the Republic is not an indispensable party, and it awarded the Arelma assets to the Pimentel class.

Accepting that the Republic is a "necessary" party under Rule 19(a) (Pet. App. 5a), the Ninth Circuit began with the term "equity and good conscience," which is part of the Rule 19(b) test. The court opined that, "in its earlier usage, equity brought to mind a fairness sought by the chancery courts that transcended statutory law and 'good conscience' referred to an interior moral arbiter regarded as the voice of God." *Id.* at 6a. The court concluded that the terms more recently had been "domesticated," taking on "a secular rather than a religious cast," but nevertheless believed that their use in Rule 19 "emphasizes the flexibility that a judge may find necessary in order to achieve fairness in the judge's choice of solutions." *Ibid.*

The Ninth Circuit then turned to the considerations identified in the text of Rule 19(b) as relevant to the indispensability inquiry. Although the court

---

[9] Several days later, the court of appeals issued a revised opinion that was amended in ways that are not material here. Pet. App. 12a–20a.

reiterated that sovereign immunity generally is a "powerful consideration," it found the Republic's immunity entitled to no weight in this case because, in its view, the Republic had no interest that it could enforce and "[t]o protect a party as indispensable, Rule 19 requires an interest that will be impaired by the litigation as a practical matter." Pet. App. 7a (citation and internal quotation marks omitted). The court believed that the Republic had no such interest because, "[a]s a practical matter, it is doubtful that the Republic has any likelihood of recovering the Arelma assets." *Ibid.* That is so, the court reasoned, because an action by the Republic to recover the assets held by Merrill Lynch in the United States would be barred by the New York statute of limitations governing suits for misappropriation of public funds. *Id.* at 8a. The court thought it immaterial that claims brought by the Republic in Philippine courts seeking recapture of assets stolen by Marcos are *not* subject to a statute of limitations, reasoning that "a court sitting in the Philippines would lack jurisdiction to issue a judgment *in rem* regarding the ownership of an asset located within the United States. If a Philippine court were to issue such a decree, a court of this country would not be bound to give it effect." *Ibid.*

For similar reasons, the Ninth Circuit found it irrelevant that the district court's judgment did not contain provisions designed to protect the Republic's interest; "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it." Pet. App. 9a. The court also reasoned that a judgment for the Pimentel class issued in the Republic's absence would be "adequate" because "the symbolic significance of some tangible recovery [for the class] is not to be disre-

garded." *Ibid.* The court was not persuaded by the argument that Marcos's victims "should find redress from their own government" because, it believed, "the Republic has not taken steps to compensate those persons who suffered outrage from the extra-legal acts of a man who was President of the Republic." *Id.* at 9a–10a. The court also stated that the Pimentel class has "no forum within the Philippines open to their claims." *Id.* at 10a.

In holding that the Republic and the PCGG are not indispensable and affirming the judgment for the Pimentel class, the Ninth Circuit recognized that the Arelma "assets may be distributed after judgment here and be beyond recapture," so that, "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." Pet. App. 8a–9a. But the court did not regard that as relevant because, as noted above, it believed that the Republic's legal claim to the assets ultimately would fail on statute of limitations grounds. Thus, the court concluded, "[n]o injustice is done if [the Republic] now loses what it can never effectually possess." *Id.* at 10a. The court added that "neither Arelma itself," which it characterized as a "shell corporation," "nor the Philippine National Bank as escrow holder now have an interest to be protected." *Ibid.*

The court of appeals subsequently denied a renewed petition for rehearing. In doing so, it reiterated its view that the Republic could not enforce a Philippine judgment awarding it the Arelma assets because "[t]he Republic has no jurisdiction over the *rem* [*sic*], which is in the United States, and any judgment made without proper jurisdiction is unenforceable in the United States." Pet. App. 61a. The Ninth Circuit also restated its view that suit may

proceed under Rule 19(b) even in the absence of a necessary party that asserts sovereign immunity. The court recognized that "some courts have held that sovereign immunity forecloses in favor of [the sovereign] the entire balancing process under Rule 19(b)." But the Ninth Circuit explicitly rejected that approach, instead "follow[ing] the four-factor process even with immune [entities]." *Id.* at 61a–62a (citation and internal quotation marks omitted).

SUMMARY OF ARGUMENT

I. The Rule 19 issue was properly before the court of appeals and is properly before this Court. Wholly apart from the right of the Republic to appeal, PNB and Arelma had an unquestioned right to appeal and seek certiorari. When they did, the Ninth Circuit and this Court became obligated to apply Rule 19(b) so as "to protect the absent party, who of course had no opportunity to plead and prove his interest below." *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 111 (1968).

Moreover, the Republic had the right to appeal the Rule 19 question on its own. The Republic was named a party to this litigation; while a party, it requested the relief it is seeking now on appeal and by certiorari; it was denied that relief by the district court, in a ruling that had the effect of substantially vitiating the Republic's sovereign immunity; and it suffered injury through denial of that relief, amounting to a final decision on its rights, that it is able to redress only by taking an appeal. In these circumstances, the appeal simply permits the Republic to continue pursuing the relief it requested prior to its technical dismissal from the suit.

II. On the merits, the case should be dismissed under Rule 19(b). The sovereign immunity of an absent party is a "substantive" factor that is "compelling" and requires dismissal of the action. *Provident*, 390 U.S. at 118–119. For the suit to proceed in the Republic's absence would override its immunity as a practical matter, effectively depriving the Republic of assets it claims under Philippine law and coercing it to participate in the litigation. Such an outcome cannot be reconciled with the immunity principle.

In addition, even apart from the question of immunity, the Ninth Circuit's analysis misapplied the equitable considerations that bear on indispensability under Rule 19. The judgment here substantially impaired the Republic's interest in the Arelma assets; the Ninth Circuit's belief that the Republic would not prevail if it brought suit to recover those assets is both legally immaterial and wrong on its own terms. That judgment could not possibly be structured to protect the Republic's interest. The judgment also is not "adequate" because it wholly discounts the Republic's claim and does not, even in the Ninth Circuit's own view, completely resolve the Arelma dispute. And there is no need for an alternative remedy here, both because resolution of the Pimentel class claim should occur *after* ownership of the Arelma assets is settled in the Philippines and because the unavailability of a forum is a consequence of the Republic's immunity.

Finally, an additional set of considerations also militates powerfully against adjudication of this action. Entry of judgment here would effectively preclude the Republic from recovering assets stolen by its former President, short-circuiting litigation now pending in the Philippine courts and interfering with

one of the Republic's essential interests. And continuation of this litigation also threatens to disrupt broader international cooperation in combating official corruption, causing friction in the United States' relationship with important allies.

ARGUMENT

I. The Rule 19 Question Was Properly Brought Before The Court Of Appeals And This Court.

Both in the interlocutory appeal to the Ninth Circuit and again in their appeals after the district court entered final judgment for the Pimentel class, the Republic, the PCGG, PNB, and Arelma each argued that this case should have been dismissed under Rule 19. The Ninth Circuit entertained and decided these appeals on the merits. After the Ninth Circuit ruled against these appellants in their second appeal, they sought review in this Court, which granted their joint petition for certiorari. Upon doing so, however, the Court instructed the parties to address the following questions:

> Whether the Republic of the Philippines (Republic) and its Presidential Commission on Good Government (PCGG), having been dismissed from the interpleader action based on their successful assertion of sovereign immunity, had the right to appeal the district court's determination that they are not indispensable parties under Federal Rule of Civil Procedure 19(b); and whether the Republic and its PCGG have the right to seek this Court's review of the court of appeals's opinion affirming the district court.

The Court need not resolve these questions because there is no doubt that *PNB and Arelma* had a right to appeal the case to the Ninth Circuit and to seek review in this Court, a course that permitted—indeed, obligated—the court of appeals and this Court to address the Rule 19(b) question. If the Court does reach the issue of appealability, though, it should hold that the Republic was entitled to preserve its essential rights by presenting the Rule 19 issue on appeal and by means of certiorari.

A. PNB and Arelma properly brought the Rule 19 question before the court of appeals and this Court.

Regardless of whether the Republic is a proper appellant or petitioner, the question of the Republic's status as an indispensable party to the interpleader proceeding was properly placed before the court of appeals and then this Court by PNB and Arelma. They were named as defendants in the amended complaint. JA 13, 15. As parties that indisputably were bound by the district court's final judgment, they plainly were entitled to—and did—appeal from that judgment and seek certiorari in this Court.

Once PNB and Arelma invoked the jurisdiction of the Ninth Circuit and of this Court, principles of equity placed the question whether Rule 19(b) requires dismissal of the action in the Republic's absence squarely before the court of appeals and this Court—and would have even if *no* party had raised the issue. Rule 19 serves three basic purposes: "to protect the absentee from prejudice, to protect those made parties from harassment by successive suits, and to protect the courts from being imposed upon by multiple litigation." 7 C. Wright *et al.*, *Federal Practice and Procedure* § 1609, at 142 (3d ed. 2001) [hereinafter

Federal Practice and Procedure]. "For the first of these purposes, timely objection of the parties is immaterial. If the absentee otherwise will suffer prejudice, the court *must act on its own initiative* to protect the absentee * * *." *Ibid.* (emphasis added); see also, *e.g.*, *Provident*, 390 U.S. at 111; *Minnesota* v. *N. Secs. Co.*, 184 U.S. 199, 235 (1902) (failure to join an indispensable party "may be enforced by the court, *sua sponte*, though not raised by the pleadings or suggested by the counsel"); *Hoe* v. *Wilson*, 76 U.S. 501, 504 (1869); *Mallow* v. *Hinde*, 25 U.S. (12 Wheat.) 193, 198 (1827).

The obligation to protect the rights of absent persons extends to appellate courts, as this Court has expressly held: "When necessary, * * * a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." *Provident*, 390 U.S. at 111. See 7 *Federal Practice and Procedure*, *supra*, § 1609, at 138–144. Thus, the appeal of PNB and Arelma obligated the court of appeals to consider whether the prospect of prejudice to the absent Republic required dismissal of the interpleader action pursuant to Rule 19(b). The grant of PNB's and Arelma's petition for certiorari properly places the issue before this Court as well.

Moreover, PNB and Arelma in fact *did* repeatedly raise the Rule 19(b) issue, in both the district court and the court of appeals. Under the Federal Rules of Civil Procedure and basic principles of equity, any party may raise the failure to join an indispensable party as grounds for dismissal of a case. See Fed. R. Civ. P. 12(b)(7); 7 *Federal Practice and Procedure*, *supra*, § 1609, at 139 ("[a]ny party may bring the issue to the court's attention"). A party

seeking dismissal may do so by asserting that either it or the absent party would be disadvantaged were the case to proceed to judgment without the participation of the absent party. See Advisory Committee Notes, 1966 Amendment to Rule 19 (observing that the moving party may be "seeking dismissal in order to protect himself against a later suit by the absent person" or may be "seeking vicariously to protect the absent person against a prejudicial judgment"). In this case, obtaining dismissal of the interpleader action was in PNB's interest as an escrow agent bound to dispose of Arelma assets only in accordance with a ruling of a Philippine court, and in Arelma's interest as the legal owner of the assets. See CA9 E.R. 150–155; note 7, *supra*. Accordingly, PNB and Arelma properly raised the issue of the Republic's indispensability in the district court, appealed the adverse determination of the district court to the court of appeals, and petitioned for review by this Court.

B. The Republic was entitled to appeal and seek review in this Court.

Although the involvement of PNB and Arelma make it unnecessary for the Court to address the questions it posed, the Republic also was entitled to appeal and to seek review in this Court.

1. This Court has "never * * * restricted the right to appeal to named parties to the litigation," and in any event "[t]he label 'party' does not include an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin* v. *Scardelletti*, 536 U.S. 1, 7, 10 (2002). See also *Karcher* v. *May*, 484 U.S. 72, 77 (1987) (noting, with reference to a prior version of 28 U.S.C. § 1254, "the general rule that one who is not a party or has not been *treated as*

a party to a judgment has no right to appeal therefrom") (emphasis added); *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917) (declining to entertain appeal by a state that "was not at any time a party to this record" on the ground that no appeal can be taken by a person "who is not a party *or privy to the record*") (emphasis added). And the Court has recognized the importance of permitting appeal when a district court's decision "amounted to a 'final decision of [petitioner's] right or claim'" or when "appealing * * * is petitioner's only means of protecting himself." *Devlin*, 536 U.S. at 9, 10–11 (bracketed material added by the Court; citation omitted).

2. These principles control in a case like this one, where an entity that was a party is dismissed on grounds that deny it the full relief it requested from the district court. To be sure, the Republic's dismissal from the case on sovereign immunity grounds prior to its second appeal means that, in one technical sense, it may not have been a "party" to the action at the time the district court entered its final judgment. But "[l]ittle difficulty is encountered in rejecting spurious arguments that parties who have been 'dismissed' cease to be parties and cannot appeal." 15A *Federal Practice and Procedure*, *supra*, § 3902.1, at 102.

The Republic *was* a party that was named in the litigation at the outset. In that capacity, it sought two closely connected forms of relief in the district court—dismissal *of itself* on sovereign immunity grounds and dismissal *of the action* under Rule 19—both of which were essential to protect its rights and which are inextricably related in the context of an interpleader action. The district court denied both forms of relief and the Republic properly appealed

the denial of both to the Ninth Circuit. That court granted one form of relief (dismissal of the Republic on sovereign immunity grounds) but reserved judgment on the other, staying the action "as an alternative to [the Republic's] preferred remedy of dismissal of the entire interpleader action." Pet. App. 42a. On remand, the district court dissolved the stay and, after doing so, entered a final judgment on the merits that, all agree, severely prejudices the Republic's interests as a practical matter. At that point, the Republic appealed from the final judgment so as to raise, once again, the "reserved" issue of its indispensability under Rule 19(b).

The Republic thus (1) was a party; (2) while a party, requested the relief that is now the subject of this appeal and that is necessary to protect its interest; (3) was not only "privy to" (*Jack*, 244 U.S. at 402) but also largely responsible for the record in this case on the Rule 19(b) issue; and (4) was, and is, prejudiced by the denial of the requested relief. Against this background, two principal considerations establish the Republic's right to appeal.

First, the Republic asserted an interest—its entitlement not to have the litigation proceed—that has been finally decided by the district court and that will be irretrievably lost if the Republic cannot appeal. The two forms of relief initially sought by the Republic in the district court, dismissal of itself and of the action, were inextricably bound together in the context of an interpleader action. From the inception of this lawsuit, the Republic asserted that its absence from the litigation barred adjudication of *any* claims to the Arelma assets and required dismissal of the entire action. The district court's dismissal of the Republic as a party prior to resolving the Rule 19(b)

motion in no way diminished the Republic's interest in the court's eventual disposition of that issue. To the contrary, the peculiar nature of interpleader is such that, if such an action is allowed to continue after an immune sovereign is dismissed, the assertion of immunity actually *impairs* the sovereign's ability to protect its claimed interest in the disputed assets, leaving those assets to be awarded to or divided among the remaining claimants. See 7 *Federal Practice and Procedure*, *supra*, § 1705, at 556 ("[o]bviously, it is in the interest of each claimant to defeat or diminish the recovery of every other claimant").

Accordingly, the bare assertion (or grant) of immunity to the Republic could not serve to protect the Republic's interest. Instead, protection of its rights depended on successful assertion of the Republic's immunity *in conjunction with* a favorable disposition of its Rule 19(b) motion. Denial of the Rule 19 motion in this context, which allowed the interpleader action to go forward and the Arelma assets to be awarded to some other party, therefore "amounted to a 'final decision of [the Republic's] right or claim' sufficient to trigger [its] right to appeal." *Devlin*, 536 U.S. at 9 (citation omitted). That the district court dismissed the Republic from the suit prior to final disposition of the Rule 19(b) motion should not deny the Republic the opportunity to vindicate this essential right.

Second, an appeal from the district court's final judgment was the Republic's "only means of protecting [it]self" by seeking the relief it was denied below. Precluding an appeal "would deprive [the Republic] of the power to preserve [its] own interests." *Devlin*, 536 U.S. at 10, 11.

In its initial appeal to the court of appeals, the Republic pursued both dismissal of itself on sovereign immunity grounds and dismissal of the litigation on Rule 19 grounds. By appealing now, the Republic is simply continuing its pursuit of the relief that it requested prior to its dismissal from the action. In these circumstances, it would be perverse if the partial relief that the Republic did receive in its first appeal—dismissal of itself (but not of the whole suit) on sovereign immunity grounds—had the effect of precluding it from challenging on appeal the denial of the full relief it requested. Such an outcome would mean that the grant of sovereign immunity left the Republic *worse* off than if *both* forms of requested relief had been denied. Cf. *Minnesota* v. *United States*, 305 U.S. 382 (1939) (sovereign immunity prevented joining United States in case, but the United States nevertheless was able to challenge on appeal the denial of its motion to dismiss the action for failure to join an indispensable party).

3. This conclusion draws additional support from the "intensely 'practical' approach" the Court has taken to the right of appeal in other contexts. *Mathews* v. *Eldridge*, 424 U.S. 319, 331 n.11 (1976) (quoting *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). For example, although 28 U.S.C. § 1291 limits appellate jurisdiction to "final judgments" of the district courts, this Court has long espoused a "practical rather than a technical construction" of this provision to preserve meaningful opportunity for appellate review. *Cohen*, 337 U.S. at 546. Because orders adjudicating rights collateral to the merits of an action may not be merged into the final judgment, the right to appeal those decisions would be "lost, probably irreparably," if appeal could be taken only upon entry of final judgment. *Ibid.*

Thus, "so as not to frustrate the right of appellate review," courts will entertain prejudgment appeals of collateral orders "when the practical effect of the order will be irreparable by any subsequent appeal." *DiBella* v. *United States*, 369 U.S. 121, 126 (1962). For reasons outlined above, the same outcome is appropriate here.

Similarly, the right to appeal from collateral orders extends both to parties and to affected nonparties. See, *e.g.*, *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940); *U.S. Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988); *United States* v. *Nixon*, 418 U.S. 683, 691–692 (1974). The same regard for function over form also is reflected in the rule permitting appeals from the denial of third-party motions to intervene. *Bhd. of R.R. Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 524 (1947). Denying the opportunity to appeal on the ground that the sovereign had been dismissed from the action as a technical matter would amount to precisely the sort of "self-defeating judicial construction" that the Court has rejected in these other settings. *DiBella*, 369 U.S. at 126.

4. Finally, the Republic and the PCGG had the right to seek review in this Court. Under 28 U.S.C. § 1254(1), this Court may grant review by writ of certiorari "upon the petition of any party to any civil or criminal case." The term "party" is not defined. But if the Republic and the PCGG were entitled to appeal to the court of appeals, they surely were parties to that appellate proceeding in every ordinary sense: they were named in the caption of the case in the court of appeals, sought (and were denied) relief in that court, and will be bound by principles of estoppel that flow from the Ninth Circuit's judgment.

There is no statutory bar to their seeking review of that judgment in this Court.

II. In The Republic's Absence, This Case Should Be Dismissed Under Rule 19(b).

The framework for resolution of this case on the merits is set by Fed. R. Civ. P. 19. Under Rule 19(a)(2)(i), an entity must be joined to an action as a party—in common parlance, the entity is a "necessary" (or, in the formulation of the 2007 revision, a "required") party—if it "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may * * * as a practical matter impair or impede the person's ability to protect that interest." As the Ninth Circuit itself recognized, the Republic plainly satisfies that test. Pet. App. 5a, 40a.[10]

The crux of the issue here is found at the next step of the inquiry, in Rule 19(b). That element of the Rule provides that, if an entity described in Rule

---

[10] The court of appeals recognized that the Republic's claim to the Arelma assets is "substantial" (Pet. App. 40a) and that "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." *Id.* at 9a. In fact, the Republic's claim to the assets is considerably more than "substantial": it is compelling. The judgment of the Philippine Supreme Court awarding Marcos' Swiss assets to the Republic demonstrates in considerable detail that Marcos stole those assets from the Republic (see *Republic of the Philippines* v. *Honorable Sandiganbayan*, G.R. No. 152154, at 37–51), and the Swiss Federal Supreme Court likewise found that the illegal provenance of the assets is beyond reasonable dispute. See, *e.g.*, JA 74, 79. Indeed, it is notable that the Ninth Circuit did not suggest that there is any reason to believe that former President Marcos did not steal the Arelma assets or that they are not actually the property of the Republic under Philippine law.

19(a) cannot be made a party—which the Ninth Circuit again agreed is the case here, given the sovereign immunity of the Republic—"the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable."[11] The Rule offers four non-exclusive factors that may be considered in guiding this decision: (1) "to what extent a judgment issued in the person's absence might be prejudicial to the person"; (2) the extent to which, by use of protective provisions in the judgment, "the prejudice can be lessened or avoided"; (3) "whether a judgment rendered in the person's absence will be adequate"; and (4) "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." In setting out this inquiry, Rule 19 "emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing." *Provident*, 390 U.S. at 116 n.12.

Under this regime, a party (in the language of the pre-revision Rule 19) is deemed "indispensable" once the court concludes that the case should not proceed in the party's absence. As Justice Harlan ex-

---

[11] Thus, "[t]o use the familiar but confusing terminology" of the pre-2007 Rule 19, "the decision to proceed is a decision that the absent person is merely 'necessary,' while the decision to dismiss is a decision that he is 'indispensable.'" *Provident*, 390 U.S. at 118. To make this terminology even more confusing, although parties affected by and therefore required to be joined to the action were generally labeled "necessary" by courts and commentators prior to the 2007 revision, that word did not actually appear in the Rule. The revised Rule 19 uses the term "required party" to describe those that must be joined if possible (those formerly described by courts as "necessary") and eliminates the term "indispensable."

plained for a unanimous Court in the leading decision on Rule 19(b):

> [t]he decision whether to dismiss (*i.e.*, the decision whether the person missing is "indispensable") must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. Rule 19 does not prevent the assertion of compelling substantive interests; it merely commands the courts to examine each controversy to make certain that the interests really exist.

Provident, 390 U.S. at 118–119. For several reasons, the Ninth Circuit's application of these principles was fundamentally flawed.

A. A case must be dismissed under Rule 19(b) when a necessary party is unavailable because it has sovereign immunity.

1. Allowing suit to proceed when a necessary party asserts sovereign immunity is inconsistent with the policies of the immunity doctrine.

To begin with, the Ninth Circuit departed from principles regarded as fundamental by this Court when it failed to recognize that the sovereign immunity of a "necessary" party is one of those "substantive" factors that are "compelling by themselves" (*Provident*, 390 U.S. at 118–119) and that, without more, generally *require* dismissal of the action under Rule 19(b). Since Revolutionary times, it has been thought "'inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its*

consent. This is the general sense and the general practice of mankind.'" *Fed. Maritime Comm'n* v. *S.C. State Ports Auth.*, 535 U.S. 743, 752 (2002) (quoting *The Federalist*, No. 81, at 487–488 (C. Rossiter ed. 1961) (Hamilton) (emphasis in *The Federalist*)). So far as foreign sovereigns are concerned, that principle was recognized "very early in our history" and "has since become part of the fabric of our law" (*Nat'l City Bank of N.Y.* v. *Republic of China*, 348 U.S. 356, 358 (1955)), established first by this Court as a matter of common law (see *Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116 (1812)) and subsequently codified in the FSIA.

It has long been the position of the United States that immunity in domestic courts for foreign sovereigns serves interests of substantial public importance: "'the purpose of sovereign immunity in modern international law . . . is to promote the functioning of all governments by protecting a state from the burdens of defending law suits abroad which are based upon its public acts.'" *Segni* v. *Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987) (quoting testimony of State Department Legal Advisor)). Such immunity is provided as a "gesture of comity between the United States and other sovereigns." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003). See *Republic of Austria* v. *Altmann*, 541 U.S. 677, 688–689 (2004); *Verlinden B.V.* v. *Cent. Bank of Nigeria*, 461 U.S. 480, 486–487 (1983). Where it applies, immunity spares the sovereign's treasury, altogether protects it against the burden of having to engage in litigation, preserves important dignatory interests of the sovereign, and—in the international context—avoids what otherwise would be the source of considerable friction in the United States' foreign

relations. See, *e.g.*, *Fed. Maritime Comm'n*, 535 U.S. at 765–766; *Nat'l City Bank*, 348 U.S. at 362.

In this case, the court below purported to respect the Republic's sovereign immunity by dismissing it from the action. But the Ninth Circuit then proceeded to resolve the interpleader action on the merits and to award the Arelma assets to another claimant. Even if the Republic is not bound in a technical sense by that judgment, allowing litigation like this to proceed in the absence of a sovereign that claims immunity, when the sovereign is a "necessary" party under Rule 19(a), wholly vitiates the significance of its immunity. The Ninth Circuit itself acknowledged that the litigation here will accomplish precisely that result, recognizing that, "[i]n practical effect, a judgment in this action will deprive the Republic of the Arelma assets." Pet. App 9a. That outcome would make the Republic's assertion of immunity meaningless as a practical matter and wholly frustrate the compelling interests served by the immunity doctrine, the foremost of which is to ensure that a sovereign's interests are not adjudicated against its will. See, *e.g.*, *Enter. Mgmt. Consultants, Inc.* v. *United States*, 883 F.2d 890, 894 (10th Cir. 1989) (suit adjudicating sovereign's interest in a contract in the sovereign's absence would "effectively abrogate * * * sovereign immunity"). And that real-world consequence of the judgment has special significance under Rule 19, where the decision whether to dismiss "must be made on the basis of practical considerations." *Provident*, 390 U.S. at 116 n.12.

Allowing such a judgment to issue would do more than award to private litigants assets that are claimed by a sovereign; it also would coerce the sovereign into formally surrendering its immunity and

appearing in court so that it is able to defend interests that otherwise would simply be overborne without its participation. This Court made just that point in very similar circumstances in *Federal Maritime Commission*, explaining that, when a proceeding will have the same practical effect as a judgment against a sovereign, the sovereign either "would effectively be required to defend [itself]" or would "substantially compromise its ability to defend itself at all." 535 U.S. at 762. To believe that this sort of choice does not "coerce" a sovereign into participating in litigation and waiving immunity, the Court concluded, "would be to blind ourselves to reality." *Id.* at 763–764.

Entertaining an action in the absence of a necessary party that has asserted sovereign immunity therefore is inconsistent with the immunity doctrine. In circumstances like those here, a judgment awarding assets claimed by a sovereign has the same effect on the sovereign's treasury as would a suit in which the sovereign is compelled to appear; as Judge Coffin wrote for the First Circuit, "[a] judgment for the [claimant] would necessarily be based on a holding that the [sovereign] had no right in the fund." *Am. Guaranty Corp.* v. *Burton*, 380 F.2d 789, 791 (1st Cir. 1967). And in the international context, awarding assets claimed by another nation to private parties, as the result of litigation in which that nation did not participate, destroys the "grace and comity" that underlies the immunity principle.[12] After all, "[i]t is

---

[12] The proposed United Nations Convention on Jurisdictional Immunities of States and Their Property, which was opened for signature in 2005 (U.N. Doc. A/59/508), requires recognition of immunity when a state "is not named as a party to the proceeding but the proceeding seeks to affect the property, rights, in-

wholly at odds with the policy of [sovereign immunity] to put the [sovereign] to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita & Affiliated Tribes of Okla.* v. *Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986).

2. This and other courts have recognized that an action should not proceed when a necessary party whose interests will be affected by the litigation is immune from suit.

For just these reasons, this Court already has held that a sovereign is an "indispensable" party in a suit—like this one—that "is essentially one designed to reach money which the government owns." *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 375 (1945) (citing *Minnesota* v. *United States*, 305 U.S. at 386). Such a suit must be dismissed when the sovereign claims immunity because "the government's liability cannot be tried 'behind its back.'" *Ibid.* See *California* v. *Arizona*, 440 U.S. 59 (1979); *Minnesota* v. *United States*, 305 U.S. at 383–384; 7 *Federal Practice and Procedure*, *supra*, § 1617, at 252–259 & n.10 (citing *Forrestal* and *Minnesota* for proposition that, "[w]hen an interest of the federal government is involved in a suit and a judgment cannot be rendered without affecting that interest * * * the United

---

terests or activities of that * * * State." *Id.* Art. 6(2)(b). Although the United States has not signed the Convention, "it is the position of the United States that a number of [the Convention's] provisions * * * reflect current international norms and practices regarding foreign state immunity." Brief of the United States as *Amicus Curiae* in Support of Defendant-Appellant, *Belize Telecom, Ltd.* v. *Gov't of Belize*, No. 05-12641-CC (11th Cir. Oct. 6, 2005), http://www.state.gov/s/l/2005/87217.htm.

States may be regarded as an indispensable party under Rule 19 and the action dismissed").[13] See also 4 J. Moore *et al.*, *Moore's Federal Practice* § 19.05[2][c], at 19-91 (2006) [hereinafter *Moore's Federal Practice*] ("courts are reluctant to require the absentee to protect its own interest if intervention would result in the absentee waiving an immunity to suit").

For the most part, the courts of appeals have faithfully applied this approach, holding that sovereign immunity, even if not wholly dispositive, is entitled to compelling weight in the Rule 19(b) calculus. These courts have recognized that, "when an indispensable party is immune from suit, there is very little room for balancing of other factors set out in rule 19(b), because immunity may be viewed as one of those interests compelling by themselves." *Fluent* v. *Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991) (citations and internal quotation marks omitted). Accord *Seneca Nation of Indians* v. *New York*, 383 F.3d 45, 48–49 (2d Cir. 2004); *Enter. Mgmt.*, 883 F.2d at 894; *Wichita & Affiliated Tribes*, 788 F.2d at 777. See also *Davis* v. *United States*, 343 F.3d 1282, 1293–1294 (10th Cir. 2003) (although balancing of the Rule 19(b) factors cannot be "completely avoided simply because an absent person is immune from suit," "the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit");

---

[13] Although these decisions predated Rule 19(b), the governing joinder law at the time was substantially identical to that now stated in the Rule. See *Provident*, 390 U.S. at 116 n.12 ("The new text of the Rule was not intended as a change in principles.").

United States ex rel. Hall v. *Tribal Dev. Corp.*, 100 F.3d 476, 480 (7th Cir. 1996) (same).

These holdings were compelled by the significance of the interests served by sovereign immunity. "The rationale behind the emphasis placed on immunity in the weighing of rule 19(b) factors is that the case is not one 'where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield [sovereigns] from suit without * * * consent.'" *Fluent*, 928 F.2d at 548 (quoting *Wichita & Affiliated Tribes*, 788 F.2d at 777). The Ninth Circuit's contrary conclusion "dismisses substantially the policy of [sovereign] immunity, which, after all, accords to * * * sovereignty and [the sovereign's] autonomy a place in the hierarchy of values over society's interest in making [the sovereign] amenable to suit." *Wichita & Affiliated Tribes*, 788 F.2d at 776. Cf. *United States* v. *U.S. Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940) (cross-claim against sovereign prohibited because "[t]he desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity."). In this context, requiring dismissal of a suit to preserve a foreign nation's sovereign immunity is not at all inconsistent with Rule 19(b)'s standards of "equity and good conscience"; to the contrary, the foreign sovereign immunity doctrine *itself* "deriv[es] from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign." *Nat'l City Bank*,

348 U.S. at 362. The decision below cannot be squared with this understanding.[14]

3. The conclusion that the immune party's claim to the disputed assets would not prevail on the merits if litigated is not a proper basis for disregarding its sovereign immunity.

The Ninth Circuit acknowledged that, "[i]n the usual case of interpleader, the sovereign is immune and indispensable and so can cause dismissal of the action." Pet. App. 6a. Notwithstanding that recognition, however, the court proceeded to conclude that, "under Rule 19, [sovereign immunity] is *not* the sole consideration." *Id.* at 7a (emphasis added). For reasons we have explained, that conclusion was wrong. And the court of appeals greatly compounded its error in the remainder of its analysis: one of its principal bases for disregarding the Republic's immunity was its conclusion that the Republic's claim to the Arelma assets would fail *on the merits* if litigated. That reasoning endorsed an approach that effectively adjudicates a claim against the sovereign *in the sovereign's absence* as a means of determining whether

---

[14] In its brief supporting the grant of certiorari (at 10–11), the United States did not contend "that an immune sovereign is automatically indispensable," pointing to cases where litigation was allowed to proceed because the interests of the absent sovereign were adequately protected by entities that did participate in the litigation or relief was structured to avoid prejudice to the absent sovereign. There is no need for the Court to consider such exceptions in this case. Here, the Ninth Circuit acknowledged that no other party to the litigation protected the interests of the Republic (see Pet. App. 40a; see also note 7, *supra*) and it is undisputed that relief cannot be tailored to avoid injury to the Republic.

the sovereign's absence from the suit requires dismissal.

This approach rests on a basic misunderstanding of sovereign immunity. The doctrine precludes a sovereign from being compelled to litigate its interest in disputed assets; it surely also precludes a court from *itself* assessing the strength of the sovereign's claim and making the outcome turn on whether, in the court's view, the sovereign is entitled to prevail on the merits. After all, resolving the Rule 19(b) inquiry by looking at the merits of the sovereign's case actually increases the pressure on the sovereign to appear in court and participate in the litigation, as the sovereign "obviously will not know *ex ante*" how the court will assess the strength of the sovereign's claim on the merits. *Fed. Maritime Comm'n*, 535 U.S. at 764 n.17.

The perverse effect of the Ninth Circuit's approach is reflected by what happened in this case: the only consequence of the Republic's invocation of its immunity was that it was not present to protect itself when the court purported to assess the merits of its claim to the Arelma assets. Needless to say, litigation about the merits of an absent party's claim, which will proceed without a full adversary presentation on the issues, may well come to the wrong conclusion. That happened here: as we explain in more detail below (at 39–41), the Ninth Circuit was incorrect in its belief that the Republic would be unable to obtain the Arelma assets. Moreover, permitting the case to proceed in the sovereign's absence denies the sovereign an opportunity to litigate other grounds on which dismissal might be appropriate. In this case, for example, there were powerful arguments that the suit should have been dismissed on

grounds of comity, act of state, or forum non conveniens, all of which were ignored by the courts below.[15] For this reason as well, a court's non-litigated assessment of the merits is not an adequate substitute for dismissal of the action on the basis of sovereign immunity. The Ninth Circuit's contrary conclusion should be set aside.

B. Even apart from the Republic's immunity, this suit should be dismissed under Rule 19(b).

Wholly apart from its misunderstanding of the relationship between sovereign immunity and Rule 19(b), the holding below also misconstrued the equitable factors specified in the Rule as bearing on indispensability. When considering those factors, "[t]here is no prescribed formula for determining in every case whether a person . . . is an indispensable party"; rather, whether dismissal of the suit is required "can only be determined in the context of particular litigation." *Provident*, 390 U.S. at 118 n.14 (citation omitted). Assuming that a balancing of the Rule 19(b) factors could be appropriate in this case notwithstanding the Republic's immunity, there should be no doubt about the outcome: Every relevant consideration points strongly in favor of dismissal.

---

[15] The Republic and the PCGG raised each of those grounds in the district court and noted them in their briefing to the Ninth Circuit. Republic CA9 Br. 44–46. As non-participants in the underlying action following the Ninth Circuit's recognition of their immunity in the original appeal, however, they did not have an opportunity to address the issues in any detail.

1. Further litigation is improper because it will impair the interests of absent parties.

The first factor identified in Rule 19(b) indicates that "the court must consider the extent to which the judgment may 'as a practical matter impair or impede [the absent party's] ability to protect' his interest in the subject matter." *Provident*, 390 U.S. at 110 (quoting Rule 19(a)); see also Rule 19(b) ("extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties"). There is no doubt that the Republic's interest in the Arelma assets was substantially (indeed, entirely) impaired by the interpleader proceeding, and the Ninth Circuit did not suggest otherwise. It hardly could have; "conflicting claims * * * to a common [fund] present a textbook example of a case where one party may be severely prejudiced by a decision in his absence." *Wichita & Affiliated Tribes*, 788 F.2d at 774. See 4 *Moore's Federal Practice*, *supra*, § 19.05[2][d], at 19-23 (where there are inconsistent claims to the same assets, "prejudice from nonjoinder is virtually inescapable"). As Judge Learned Hand put it for the Second Circuit, in a decision that was cited by the drafters of Rule 19, such a suit "may not be so brought, unless justice to the absent parties can be done, and we cannot see how this may be assured." *Roos* v. *Tex. Co.*, 23 F.2d 171, 173 (2d Cir. 1927).

The Ninth Circuit nevertheless held that this consideration did not favor dismissal because, it believed, the Republic's claim to the assets could not prevail on the merits if it were litigated. Pet. App. 8a–9a. But that reasoning cannot justify the holding below, for several reasons.

First, consideration of the strength or merits of the absent party's claim generally has no place in the Rule 19(b) analysis. As other courts of appeals—including the Ninth Circuit in prior decisions—have recognized, the approach taken by the Ninth Circuit here

> amounts to asking us to decide that the [absent party's] "interest" is not worthy of consideration because its position is wrong on the merits. But Rule 19's concern is with a "*claimed* interest." * * * [T]he underlying merits of the litigation are irrelevant to a Rule 19 inquiry, at least unless the claimed interest is patently frivolous.

Davis, 343 F.3d at 1291 (quoting Rule 19; other citations and internal quotation marks omitted; emphasis in original). Accord *Shermoen* v. *United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) ("the finding that a party is necessary to the action is predicated only on that party having a *claim* to an interest") (emphasis in original); *Keweenaw Bay Indian Cmty.* v. *Michigan*, 11 F.3d 1341, 1347 (6th Cir. 1993) (applying *Shermoen*); *Tankersley* v. *Albright*, 514 F.2d 956, 965–966 (7th Cir. 1975) (noting that "the necessity or indispensability of absent persons [must be] determined prior to any consideration of the merits of a case").[16] The reason is obvious: consideration of the

---

[16] Courts likewise have held consideration of the merits impermissible in the closely related context of fraudulent joinder. See, *e.g.*, *In re Briscoe*, 448 F.3d 201, 218 (3d Cir. 2006) ("it was impermissible for the district court to reach the merits of that defense in deciding the fraudulent joinder question"); *Smallwood* v. *Ill. Cent. R.R. Co.*, 352 F.3d 220, 223 n.8 (5th Cir. 2003) ("the fraudulent joinder inquiry is a summary inquiry conducted in order to determine whether the court has jurisdic-

merits would involve distracting and time-consuming collateral litigation in every case implicating Rule 19(b), requiring a court to effectively settle the rights of an absent party—and to do so in circumstances where that party is not present to defend its interests. And for reasons already noted, such an inquiry is especially inappropriate when exploring the merits would require the court to disregard the absent party's sovereign immunity.[17]

Second, even if the merits could somehow be viewed as relevant, the Ninth Circuit was wrong in its view that the Republic would be unable to obtain the Arelma funds. The court opined that the Republic had "no practical likelihood of obtaining the Arelma assets" because a suit brought by the Republic against Merrill Lynch would be barred by New York's six-year statute of limitations for misappropriation of public funds. Pet. App. 10a, 8a–9a. But Merrill Lynch had indicated that it would surrender the assets in accord with the ruling of the Sandigan-

---

tion over the matter. A court may thus not use fraudulent joinder as an excuse to pre-try the merits of the case").

[17] Citing *Provident*, the United States suggested in its brief supporting certiorari (at 11) that "the Court has not ruled out consideration of the underlying merits of a claim in the course of determining the extent of prejudice to an absent party." But *Provident* did not endorse consideration of the merits in a situation like the one here. Addressing the argument that there was virtually no chance of recovery *against* the absent party in *Provident*, and that dismissal accordingly was not warranted to protect that party, the Court briefly adverted to the possibility of "explor[ing]" this point. 390 U.S. at 115. But the Court did not indicate that it ever would be appropriate to consider the merits of a substantial claim to disputed assets asserted *by* an absent party in deciding whether suit should proceed in the party's absence. Moreover, the separate concerns implicated by sovereign immunity were not at issue in *Provident*.

bayan, which currently is adjudicating ownership of the Arelma assets. See note 5, *supra*. That court has authority under Philippine law to determine ownership of assets misappropriated by public officers and is not subject to a statute of limitations. See pages 4–6, 12, *supra*. As a consequence, had it not been for this litigation, there is every reason to believe that Merrill Lynch would have transferred the Arelma assets to the Philippines in response to a favorable ruling of the Sandiganbayan, and no reason to believe that a suit subject to the New York statute of limitations ever would have been brought.

Moreover, in the event that the Republic were forced to bring an action against Merrill Lynch to obtain the Arelma assets, the New York statute of limitations still would not be an obstacle. Such a suit would involve an attempt to enforce the judgment of the Sandiganbayan and would be premised on the *new* breach of contract reflected in refusal to transfer the funds in response to the Republic's (or PNB's or Arelma's) request, and therefore would not be affected at all by the New York statute of limitations governing misappropriation cases. Nor is there reason to doubt that the judgment of the Sandiganbayan would be enforced by a U.S. court in such a suit. As a general matter, courts in the United States (with limited exceptions not relevant here) presume that foreign courts had jurisdiction to issue their judgments. See *Restatement (Third) of Foreign Relations Law* § 482 cmts. a, d (1987); C. Chao & C. Neuhoff, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 157 & nn.64–66 (2001). In any event, the Sandiganbayan's authority to determine ownership of the Arelma shares, which are located in the Philippines, is undisputed, and control of

Arelma's funds should follow the shares. And even if it were necessary that the Sandiganbayan judgment direct forfeiture of Arelma funds located in this country, such a judgment could be enforceable under U.S. law or treaties to which the United States is a party.[18] The Ninth Circuit's belief that the Republic "has no practical likelihood of obtaining the Arelma assets" therefore was deeply misinformed.

Third, the danger of prejudice to an absent party, and the difficulties caused by proceeding with litigation when a principal defendant cannot be joined, are especially acute in an interpleader proceeding like the one here. This case presents "the classic situation envisioned by the sponsors of interpleader," in which "a stakeholder" is "faced with rival claims to the fund itself." *State Farm Fire & Cas. Co.* v. *Tashire*, 386 U.S. 523, 534 & n.16 (1967). In such circumstances, the purpose of interpleader is "broadly to remedy the problem posed by multiple claimants to a single fund," addressing the danger that the "first claimant might appropriate all or a disproportionate share of the fund"; the "difficulties such a race to judgment pose for the [stakeholder], and the unfairness which may result to some claimants, were among the prin-

---

[18] See 28 U.S.C. § 2467(c)(1)(b) ("the United States may file an application on behalf of foreign nation in [a] district court of the United States seeking to enforce the foreign forfeiture or confiscation judgment as if the judgment had been entered by a court in the United States"); Treaty on Mutual Legal Assistance on Criminal Matters (MLAT), Nov. 13, 1994, U.S.-Phil., Art. 16, S. Treaty Doc. No. 18, 104th Cong., 1st Sess. (1996); United Nations Convention Against Corruption (Convention Against Corruption), G.A. Res. 4 (LVII), U.N. Doc. A/RES/58/4, at 22, 32 (2003).

cipal evils the interpleader device was intended to remedy." *Id.* at 530, 533 (footnote omitted).

Allowing such a proceeding to go forward in the absence of a principal claimant, however, turns these policies upside down. It either assures unfairness, with the fund sought by the absent claimant awarded to someone else in that claimant's absence, or subjects the stakeholder to vexatious and multiple litigation as the absent claimant seeks to recover from the stakeholder after the funds have been paid to someone else. In either case, such litigation will (in the language of Rule 19(b)) "be prejudicial to the [absent] person or those already parties" and should not proceed to judgment. That is why the Ninth Circuit recognized, at an earlier stage of this case, that "[w]ithout all significant claimants in an interpleader action, its purpose is materially frustrated"—and that, "[g]iven the inability of the court to resolve the claims of the Republic and the PCGG, it is difficult to see how the interpleader action can proceed in their absence." Pet. App. 41a. The doubt that the Ninth Circuit expressed at that time surely was well-grounded.

2. The judgment could not be structured to protect the interests of absent parties.

The second Rule 19(b) consideration directs the court to ask whether the judgment can "'be written so as to protect the legitimate interests of outsiders.'" *Provident*, 390 U.S. at 112 n.10 (quoting Advisory Committee Notes, 1966 Amendment to Rule 19). That plainly is impossible in a case like this, where all parties are claiming 100 percent of the same funds. See, *e.g.*, *Hall*, 100 F.3d at 480 (where all claim the same assets, there is "no way that [the court] might shape relief to lessen the potential

prejudice to the [absent party]"). Again, the Ninth Circuit disregarded this consideration on the theory that, "[b]ecause the Republic has little practical likelihood of obtaining the Arelma assets, there is no need to lessen prejudice to it." Pet. App. 9a. But that analysis is just as wrong here as it is in relation to the first Rule 19(b) factor. As the Tenth Circuit has explained, the sort of approach taken by the Ninth Circuit here is improper because "this argument goes to the merits of [the absent party's] claim, rather than the potential harm to the [absent party]" that would be caused by an unfavorable judgment. *Davis*, 343 F.3d at 1292. And in any event, as we have explained, there is every reason to believe that the Republic *would* be able to recover the Arelma assets.

3. The judgment here is not "adequate" because it does not result in the complete and efficient settlement of the controversy.

As for the third Rule 19(b) factor, the Ninth Circuit found the judgment here "adequate" because, although the Arelma assets would not satisfy the Pimentel class's entire $2 billion judgment against the Marcos estate, "the symbolic significance of some tangible recovery is not to be disregarded" and pro rata distribution of the assets to the class "will have monetary meaning for the poor among them." Pet. App. 9a. But this reasoning misunderstands the Rule 19(b) "adequacy" consideration. The Rule is not concerned with whether the judgment adequately compensates the plaintiffs, as the Ninth Circuit believed. Instead, this Court has understood this consideration to take account of "the interest of the courts and the public in complete, consistent, and efficient settlement of controversies," "read[ing] the Rule's third criterion, whether the judgment issued in the ab-

sence of the nonjoined party will be 'adequate,' to refer to th[e] public stake in settling disputes by wholes, whenever possible." *Provident*, 390 U.S. at 111. See 7 *Federal Practice and Procedure*, *supra*, § 1608, at 114.

Other courts of appeals have followed that guidance, looking to whether judgment in the action will dispose of *all* interests in the dispute. As the Tenth Circuit put it, "[t]he Supreme Court has explained that Rule 19(b)'s third factor is not intended to address the adequacy of the judgment from the plaintiff's point of view. * * * Rather, the factor is intended to address the adequacy of the dispute's resolution." *Davis*, 343 F.3d at 1292–1293. Accord *Gonzalez* v. *Cruz*, 926 F.2d 1, 6 (1st Cir. 1991); *Hoheb* v. *Muriel*, 753 F.2d 24, 27 (3d Cir. 1985); *Haas* v. *Jefferson Nat'l Bank of Miami Beach*, 442 F.2d 394, 399 (5th Cir. 1971).

The judgment in this case cannot satisfy the standard articulated in *Provident*. The resolution here is hardly "adequate," as it wholly discounts the interest of the Republic. And it does not satisfy "th[e] public stake in settling disputes by wholes." *Provident*, 390 U.S. at 111. As the Ninth Circuit itself acknowledged, the Republic is not bound by the judgment and (at least as a matter of theory) is free to initiate further litigation—against either the Pimentel class or Merrill Lynch—to seek recovery of the Arelma assets. Pet. App. 8a. If that really is so, then "Merrill Lynch risks being sued again" by claimants to the assets who did not participate in the litigation. Pet. App. 10a. The judgment here therefore frustrates "all three of the interests that have traditionally been thought to support compulsory joinder of absent and potentially adverse claimants: the inter-

est of the defendant in avoiding multiple liability for the fund; the interest of the absent potential plaintiffs in protecting their right to recover for the portion of the fund allocable to them; and the social interest in the efficient administration of justice and the avoidance of multiple litigation." *Ill. Brick Co.* v. *Illinois*, 431 U.S. 720, 737–738 (1977). Just as the outcome here will "materially frustrate[]" the goals of interpleader (Pet. App. 41a), it will undermine the objectives of Rule 19.

As further support for its application of the Rule 19 adequacy consideration, the Ninth Circuit also complained that "the Republic has not taken steps to compensate those persons who suffered outrage from the extra-legal acts of a man who was President of the Republic." Pet. App. 9a–10a. But it is extraordinary—and plainly improper—for a U.S. court to rule against a foreign state because the court takes issue with the legitimate, democratically implemented policy of that state. For the same reason that individual states of the United States may not conduct their own foreign policies (see *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 418–420 (2003)), it surely is inconsistent with the interests of the United States for federal courts to base rulings on their subjective dislike for the actions of foreign governments. The success of a U.S. judgment in undermining the actions of an allied nation can hardly be thought to establish its "adequacy" under Rule 19(b).

4. Dismissal is proper even if there is no alternative forum in which the Pimentel class may assert its current claims.

The fourth specified Rule 19(b) factor, which looks to the availability of an alternative remedy if this action is dismissed, points the same way. To be-

gin with, this consideration simply cannot count in favor of the Pimentel plaintiffs. The Republic and the Marcos estate are now contesting ownership of the Arelma assets before the Sandiganbayan. The Pimentel class asserts its claim to those assets only as a creditor of the estate. And a judgment creditor may enforce its rights only against the debtor's assets. Questions regarding availability of a remedy for the class therefore should not arise until *after* resolution of the ongoing Philippine litigation, which will determine whether the Arelma assets *are* a part of the Marcos estate.

In any event, even if the availability of an alternative forum were relevant, the absence of such a forum "is less troublesome in this case than in some others" because "[t]he dismissal of this suit is mandated by the policy of [sovereign] immunity." *Wichita & Affiliated Tribes*, 788 F.2d at 777. See *Davis*, 343 F.3d at 1293–1294; *Seneca Nation*, 383 F.3d at 48; *Hall*, 100 F.3d at 480–481. Indeed, the Ninth Circuit itself has repeatedly acknowledged that the lack of an alternative remedy is of limited significance when the absent party is immune from suit. *Wilbur* v. *Locke*, 423 F.3d 1101, 1115 (9th Cir. 2005); *Am. Greyhound Racing, Inc.* v. *Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002); *Davandewa* v. *Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1162 (9th Cir. 2002). There is nothing anomalous in such an outcome. As the Ninth Circuit has elsewhere recognized, dismissal of a suit is a "common consequence of sovereign immunity" (*Am. Greyhound Racing*, 305 F.3d at 1025); absent a waiver, claims against a sovereign will be dismissed despite there being no alternative forum in which they may be advanced—even if those claims are plainly meritorious. See, *e.g.*, *Verlinden*, 461 U.S. at 497.

It may be added that there *is* a forum open to assure judicial determination of ownership of the Arelma assets. That forum is the Sandiganbayan, which is determining whether the assets are the property of the Republic or of the Marcos estate. A ruling for the Republic would settle that the assets belong to the Philippines, while a contrary outcome would make them available for recovery by the Pimentel class as part of the *Hilao* judgment against the estate. Accordingly, if the Pimentel class truly is entitled to the Arelma assets, it will have an opportunity to obtain them.

5. *The imperative that a dispute over ownership of assets stolen by a former President of the Republic be settled in a Philippine court, and the adverse impact of this litigation on international anti-corruption efforts, are additional "compelling substantive interests" that require dismissal of this suit.*

Finally, additional considerations also militate in favor of dismissal of this action. The four factors listed in Rule 19(b) are nonexclusive and, according to the 1966 Advisory Committee, "are not intended to exclude other considerations which may be applicable in particular situations." Accord 7 *Federal Practice and Procedure*, *supra*, § 1607, at 88 (four listed factors "are not mutually exclusive, nor are they the only considerations that may be taken into account by the court in a particular case."); B. Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure*, pt. 1, 81 HARV. L. REV. 356, 365 (1967) (list in the Rule is "nonexhaustive"). Such "other considerations" are at play here: the holding of the court of appeals dis-

counts the importance to the Republic of having the ownership of assets stolen from the Philippine people by its former President settled by *its* courts, embraces an approach that will cause friction in the United States' relations with other countries, and threatens to interfere with important international efforts to enforce criminal and civil laws combating official corruption. These each present "compelling substantive interests" (*Provident*, 390 U.S. at 118–119) that warrant dismissal.

a. As a general matter, there is no doubt that United States judicial decisions impinging on the interests of other nations raise matters of the greatest political sensitivity and importance. See, *e.g.*, *Verlinden*, 461 U.S. at 489. Judicial "seizure of the property of a friendly state," for example—an action that is closely analogous to the proceeding here, in which United States courts propose to distribute to third parties assets claimed by the Republic—"may be regarded as * * * an affront to [that state's] dignity and may * * * affect our relations with it." *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 35–36 (1945). The FSIA was directed at just these sorts of concerns. See, *e.g.*, H.R. REP. NO. 94-1487, at 27 (1976) (attachment of foreign government assets "can give rise to serious friction in the United States' foreign relations" and cause "significant irritation to many foreign governments").

This case graphically illustrates the problems that may arise when United States courts adjudicate the interests of foreign sovereigns without their consent. The dispute here concerns the ownership of assets claimed by the Republic that were stolen in the Philippines by its former President, a matter of the greatest importance and sensitivity to that Nation.

Paramount national policy of the Republic makes recovery of those assets a matter of the greatest urgency.[19] The Republic has sought to settle ownership of the Arelma assets through the Philippine court established for that purpose, litigating for more than fifteen years against the former President's estate and recovering large sums of money from it. Moreover, the competing claimants to the Arelma assets in the Ninth Circuit proceeding are virtually all citizens of the Philippines, which also makes *this* dispute one between the Republic and its citizens.

Against this background, the interference with the sovereign interests of the Philippines that is worked by the Ninth Circuit's judgment, as well as the likelihood that the judgment will cause significant friction in the United States' relationship with the Republic, is obvious. The Ninth Circuit interjected itself into a dispute between the Republic and its former President, over the ownership of assets stolen from the Republic during that President's tenure in office, and that also involves claims made by Philippine citizens arising out of injuries they suffered in the Philippines at the hands of the former

---

[19] See, *e.g.*, Phil. Exec. Order No. 1 (Feb. 28, 1986) (Pres. Corazon Aquino) ("vast resources of the government have been amassed by former President Ferdinand E. Marcos" and "there is an urgent need to recover all ill-gotten wealth"); Phil. Exec. Order No. 14 (May 7, 1986) (Pres. Corazon Aquino) ("the vital task of [the PCGG] involves the just and expeditious recovery of * * * ill-gotten wealth in order that the funds, assets, and other properties may be used to hasten national economic recovery"). Philippine legislation provides that recovered assets must be dedicated to advancing the public good through agrarian reform that was neglected during the Marcos era. Comprehensive Agrarian Reform Law of 1988, Philippine Republic Act No. 6657 (1988).

President. As a practical matter, the decision below frustrates Philippine policy regarding the recovery of misappropriated state assets. And it effectively pretermits ongoing litigation in the Philippine courts between the Republic and the estate of its former President. It is difficult to imagine a case in which the Republic could have a more profound interest in resolution of the matter by its own courts. This surely is the sort of "pragmatic consideration" that is entitled to substantial weight under Rule 19(b). *Provident*, 390 U.S. at 116 n.12.

b. In addition, a related reason to favor dismissal of this suit is the impact of this litigation on the broader system of international efforts to combat official corruption. A central principle of that system is that misappropriated assets should be returned to the country of origin. That policy is stressed in the Convention Against Corruption, to which both the United States and the Philippines are States Parties, which makes the "return of [stolen] assets * * * a fundamental principle" (Art. 51) and obligates a State Party to the Convention to "[t]ake such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party." Art. 54(1)(a).[20] Compliance with the Convention in general, and with this repatriation-of-assets principle in particular, is an important element of the United States' International Transparency and Anti-Corruption Agenda, which strives to "ensure respon-

---

[20] A similar principle is recognized in the MLAT, which provides in Article 16.2 that the contacting parties "shall assist each other to the extent permitted by their respective laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offenses."

sible repatriation and use of the ill-gotten funds." Statement of the U.S. Delegation, Fifth Global Forum on Fighting Corruption & Safeguarding Integrity, Sandton Convention Centre, Johannesburg, South Africa, April 3, 2007, available at http://www.state.gov/p/inl/rls/other/82588.htm.

Indeed, it was application of this principle that led the Swiss Federal Supreme Court to return Marcos-related assets (including the Arelma shares) to the Philippines once it became clear that "[t]oday's state of knowledge does not allow serious doubts about the illegal provenance of the seized monies." *Republic of the Philippines* v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997, at 211. The court explained that "[t]he decision whether to seize or restitute the monies seized must be taken in the Philippines where the criminal actions were committed." *Ibid.* (emphasis added).[21] Specifically rejecting claims to the Marcos assets asserted in the Swiss proceedings by the Pimentel class (see JA 84-87), the Swiss court noted that, although those injured by the Marcos regime "are entitled to compensation and a fair trial in which they can enforce their claims for compensation," it "is not possible to derive a right to attach the assets blocked in Switzerland for *previous* compensation. Therefore, the victims of the Marcos regime as a matter of principle are obliged to either participate in the probate proceedings if they want to assert Ferdinand Marcos' personal responsibility for the human rights violations committed during his tenure, or they have to claim damages from the Philippine government for the wrongs committed by its

---

[21] See also JA 85; *Fed. Police Dept.* v. *Aguamina Corp.*, No. 1A.87/1997; *In re Aguamina Corp.*, No. 1A.31, 41/1998.

organs." *Republic of the Philippines* v. *Fondation Maler & Arelma, Inc.*, No. 1A.101/1997, at 214 (emphasis in original). The existence of the Pimentel claims "does not create the inference that [they] have priority" over the Republic. JA 85.[22]

Thus, the Ninth Circuit's decision departs from and threatens to undermine the cooperative international system encouraging the repatriation of stolen assets that has been encouraged by the United States. In striking the balance under Rule 19(b), that consideration, too, is a "compelling substantive interest[]" that counsels in favor of dismissal of this action.

CONCLUSION

The judgment of the court of appeals should be reversed.

---

[22] For this reason, Switzerland submitted a diplomatic note to the State Department urging the United States to support the Republic's efforts to obtain reversal of the Ninth Circuit's decision. The note emphasized that "[r]eturning illicit assets to their country of origin through close international cooperation constitutes an important pillar of Swiss policy toward combating the inflow of illegal funds. Accordingly, Switzerland has cooperated closely and successfully with the Philippines on the return of the assets of Ferdinand Marcos. Swiss Federal Supreme Court decisions in 1997 and 1998 affirmed that, under international law, the Philippines should have the opportunity to determine the appropriate manner in which the Marcos funds should be used for compensating victims of human rights violations under the Marcos regime." Pet. Cert. Reply Br. App. 1a. Switzerland added that "[t]he rulings of the U.S. courts at issue appear to run counter to the current trends in multilateral cooperation represented by the [United Nations Convention on Corruption] and by Switzerland's own prior actions in assisting the Philippines." *Id.* at 2a.

Respectfully submitted.

STEPHEN V. BOMSE
Counsel of Record
JOSHUA E. ROSENKRANZ
RACHEL M. JONES
ADAM J. GROMFIN
Heller Ehrman LLP
333 Bush Street
San Francisco, CA 94104
(415) 772-6000

Counsel for Petitioners Republic of the Philippines and Philippine Presidential Commission on Good Government

KENNETH S. GELLER
CHARLES A. ROTHFELD
DAVID M. GOSSETT
ELIZABETH G. OYER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioners Philippine National Bank and Arelma, Inc.

JANUARY 2008

ADDENDUM

FEDERAL RULE OF CIVIL PROCEDURE 19

Effective December 1, 2007

(a) Persons Required to Be Joined if Feasible.

(1) ***Required Party.*** A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) ***Joinder by Court Order.*** If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) ***Venue.*** If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined,

the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

* * *